APPEAL FROM APPELLATE DECREE NO.120 OF 1989

Against the judgment dated 9.8.1988 and decree dated 10.3.1989 passed in Title Appeal No.75 of 1986 by Sri Bhawesh Kumar Darghawan, Addl. District Judge(I),Barh confirming the judgment dated 24.3.1986 and decree dated 7.4.1986 passed in Title Suit No.55 of 1977/38 of 1982 by Sri Hemshanker Kumar Singh, Addl. Sub-Judge-II, Barh.

KARU NONIA .... Appellant

Versus

BIHAR SUBAY SHIA MOGLISH & ORS .... Respondents

For the Appellant : M/S Mritunjay Pd. Singh,Adv.
Neeraj Nandan, Adv.

For the Respondents : None

P R E S E N T

THE HON'BLE MR. JUSTICE GHANSHYAM PRASAD

Ghanshyam Prasad,J. This appeal by the plaintiff has been preferred against the judgment and decree dated 9.8.1988 passed by Ist Additional District Judge, Barh in Title Suit No.75 of 1986 thereby he has dismissed the appeal and confirmed the judgment and decree dated 24.3.1986 passed by Additional Sub-Judge-II, Barh in Title Suit No.55 of 1977.

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2. The plaintiff-appellant filed the suit in question for declaration that he is occupancy raiyat with respect to land detailed in Schedule-A to the plaint as well as for permanent injunction against the defendant-respondent from interfering with his possession.

3. The case of the plaintiff, in brief,

is that the suit land was originally belonged to one Usuf Kuli Khan, who created a waqf in favour of Hazarat Imam Hussain and appointed himself as its first motawalli. After his death, other persons one after the other succeeded as the motawalli. About 50 years back, the suit land was settled with the plaintiff for a period of three years who took settlement in name of his elder brother Jagdish Nonia (defendant no.8). The settlement was renewed for several times by the motawallis. Now he being in cultivating possession of the land for several decades, has acquired occupancy right over the suit land.

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4. Only defendant no.1 Bihar State Shia Waqf Board filed written statement and contested the suit. The case of the defendant, in short, is that the plaintiff and Jagdish Nonia were members of joint family. Jagdish Nonia as Karta of the joint family originally took settlement of the suit land from then motawalli for a period of three years. All the members of the family including plaintiff were benefited by the said settlement and they also jointly cultivated the said land. It is further averred that after expiry of period of thee years, the possession was handed

over to motawalli by them. Subsequently, in the year 1960, Jagdish Nonia again took settlement of the suit land for a period of 11 years from the then motawalli. However, the settlement was illegal as it was taken without obtaining permission of the majlis of the Waqf Board. When the Board came to know about settlement, a Title Suit bearing No.48 of 62 was filed against Jdgdish Nonia as Karta of the joint family for setting aside the settlement dated 12.4.1960. On contest the suit was decreed in favour of the Waqf Board. The same was upheld up to Second Appeal by the Hon'ble Court. The delivery of possession was also effected on 28.1.1978 in favour of the Board. Thereafter, the suit was filed.

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5. The trial court framed as many as five issues. The Issue nos. 3 and 4 were taken up together for discussion and ultimately, the trial court held that the plaintiff and Jagdish Nonia were members of the joint family and the matter in question had already been decided in earlier suit i.e. Title Suit No.48 of 1962. Therefore, the plaintiff being a member of the joint family cannot raise this matter in separate suit. Accordingly, the suit was dismissed.

6. Being aggrieved by the judgment of the trial court, the plaintiff preferred appeal. The appeal was finally decided by Additional District Judge-II, Barh vide impugned judgment. The learned Additional Judge framed following two points :

(i) Whether the decree passed in favour of the Waqf Board in Title Suit No.48 of 1962 operates as res judicata against the present appellant?

(ii) Whether the appellant has got any right or title in the suit land as claimed by him ?

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7. The learned Additional District Judge concurred with the findings of the trial court and held that Jagdish Nonia took settlement as Karta of the family consisted of the plaintiff-appellant also. Jagdish Nonia was impleaded in Title Suit No.48 of 1962 as Karta of the family and, therefore, decision of Title Suit No.48 of 1962 was binding upon the plaintiff-appellant and hence the suit was barred by law of res judicata.

8. The second appeal has been admitted to be heard on following substantial question of law:

I) Whether the courts below were justified in dismissing the suit on the ground

that the same was barred by res judicata?

9. Heard the learned counsel for the appellant. No one appeared on behalf of the respondents inspite of notice.

10. The learned counsel for the appellant challenged the judgment in question mainly on the ground of non-applicability of principle of res judicata. It is submitted that the plaintiff-appellant was not party in previous suit bearing Title Suit No.48 of 1962 and, therefore, section 11 C.P.C. is not attracted in the suit. The other submission is that issue of occupancy raiyat was not the issue in previous suit and, therefore, there is no question of applicability of principle of res judicata.

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11. Ext.F is the certified copy of the judgment dated 3.8.1967 passed in Title Suit No.48 of 1962.It appears from the judgment that respondent no.1 Bihar Subai Shia Majlis Wakf Board had filed the above suit against one Mirza Mehdi, the motawalli of Wakf Board created by Usuf Kuli Khan,and Jagdish Nonia (defendant no.2)for setting aside the lease dated 12.4.1960 executed by defendant no.1 in favour of defendant no.2 as well as for recovery of possession. The same was

decreed in favour of plaintiff, who is respondent no.1 in this appeal.

12. Ext.G would go to show that Jagdish Nonia preferred appeal. The same was also dismissed. Ext.H would go to show that the second appeal preferred by Jagdish Nonia before the High Court was also dismissed. Thus, the matter regarding settlement of the disputed land in favour of Jagdish Nonia had attained its finality much before filing of the suit in question.

13. It appears that after deliver of possession in the aforesaid suit, the plaintiff-appellant Karu Nonia, younger brother of Jagdish Nonia, filed this suit for declaration that he is occupancy raiyat of the suit land. The case of the plaintiff is that actually he took settlement of the suit land but in name of his elder brother Jagdish Nonia. In earlier suit i.e. Title Suit No.48 of 1962 only Jagdish Nonia was party and, therefore, judgment and decree passed in Title Suit is not binding upon him. Further case is that actually Jagdish Nonia never cultivated the land nor had any concern with the same.

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14. The defendant-respondent no.1 contested the suit by filing written statement.

The main case is that Jagdish Nonia took settlement of the suit land as Karta of the family of which the plaintiff Karu Nonia was also one of its members. All members of the family including Karu Nonia were benefited by settlement. It has further been averred that in earlier suit only Jagdish Nonia was party as the deed stood in his name but suit was actually contested by all members of the family including Karu Nonia and hence, the decree passed in Title Suit No.48 of 1962 was binding upon by all the members of the family including the plaintiff Karu Nonia.

15. From above facts, it is quite clear that matter in both the suits were directly and substantially the same. In both the suits, the question of legality of settlement taken in name of Jagdish Nonia was in issue.

16. However, the admitted fact is that in earlier suit the plaintiff-appellant Karu Nonia was not party. As said above, the specific case of the defendant-respondent is that Jagdish Nonia took settlement as Karta of the family and the earlier suit was contested by him on behalf of all the members of the family including Karu Nonia. The trial court framed specific issue no.4 on the

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point of joint family and Jagdish Nonia as Karta of the family. The lower court after discussion of all oral and documentary evidence decided the issue in affirmative and held that Jagdish Nonia was Karta of the family and hence, the judgment of the earlier suit was binding upon the plaintiff. The learned Additional District Judge has also affirmed the findings of the trial court. He has held that Jagdish Nonia was Karta of the family and he was impleaded in earlier suit i.e. Title Suit No.48 of 1962 in that capacity. Therefore, it was not necessary to implead Karu Nonia alongwith Jagdish Nonia. He has also held that the judgment and decree passed in Title Suit No.48 of 1962 was fully binding upon the plaintiff and hence, it operates as res judicata.

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17. Question of joint family and Kartaship of Jagdish Nonia is question on facts. There is concurrent findings of both the courts on this point. Therefore, in view of scope of Section 100 C.P.C. this Court is not competent to interfere in the findings of the lower court.

18. So far the applicability of principle of res judicata is concerned, in the facts and circumstances as well as law enshrined in section

11 of the C.P.C., I am also of the view that the suit of the plaintiff-appellant was barred by principle of res judicata. There is no illegality in the finding of the lower courts.

19. The view of this Court is fortified by two decisions of the apex court reported in 1970 Supreme Court Page-5 (AmritSagar Gupta and other v. Sudesh Behari Lal and others) and 1977 Supreme Court Page-1268 (Narayan Prabhu Venkateshwara Prabhu v. Narayana Prabhu Krishna Prabhu).

20. In both the decisions of the apex court, the matter in question has been considered. In paragraphs 6 and 7 of the decision reported in 1970 (Supra) it has been held as follows :

> "6. It is not necessary, in order that a decree against the manager may operate as res judicata against coparceners who were not parties to the suit that the plaint or written statement should state in express terms that he is suing as manager or is being sued as a manager. It is sufficient if the manager was in fact suing or being sued as representing the whole family see Lalchand v. Sheogobind, ILR 8 Pat 788=(AIR 1929 Pat 741): Ram Kishan v. Ganga Ram, ILR 12 Lah 428= (AIR 1931 Lah 559): Pirthipal Singh v. Rameshwar, ILR 2 Luck 288= (AIR 1927 Oudh 27): Surendranath v. Sambhunath, ILR 55 Cal 210=(AIR 1927 Cal 870).

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> 7. The suit by or against the manager will be deemed to be one brought by him or against him as representing the family if the circumstances of the case show that he is the manager of the family and the property involved in the suit is family property, see Mulgund Co-operative Credit Society v. Shidlingappa Ishwarappa, ILR (1941) Bom 682=(AIR 1941 Bom 385). See also Venkatanarayana v. Somaraju, AIR 1937 Mad 610 (FB). It is not necessary, where the manager is the plaintiff, that the plaint should state in distinct terms that he is suing as manager or where he is the defendant that he is being sued as manager. A Karta can represent the family effectively in a proceeding though he is not named as such, see Mani Sahoo v. Lokanath Mishra, AIR 1950 Ori 140."

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21. Similarly, in paragraph-20 of the decision reported in 1977 (Supra), the apex court has held as follows :

> "20. We think that the submission made by the learned Counsel for the respondents is sound. In a partition suit each party claiming that the property is joint, asserts a right and litigates under a title which is common to others who make identical claims. If that very issue is litigated in another suit and decided we do not see why the others making the same claim cannot be held to be claiming a right "in common for themselves and others." Each of them can be deemed, by reason of explanation VI, to represent all those the nature of whose claims and interests are common or identical. If we were to hold

> otherwise, it would necessarily mean that there would be two inconsistent decrees. One of the tests in deciding whether the doctrine of res judicata applies to a particular case or not is to determine whether two inconsistent decrees will come into existence if it is not applied. We think this will be the case here."

22. Thus, for the reasons stated above as well as the law laid down by the Supreme Court as discussed above, I find no merit in this appeal.

23. Accordingly, the same is dismissed with cost.

Lawyer's fee Rs.250/-
Lawyer's clerk's fee Rs.50/-

(Ghanshyam Prasad)

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Patna High Court
Dated the 21st July,2008
N.A.F.R./N.H.